

# Health and Human Services Agency California Office of HIPAA Implementation

## POLICY MEMORANDUM

2002-02

**TO:** Directors  
Department of Corrections  
California Youth Authority  
California Public Employees' Retirement System  
Department of Veterans Affairs  
Department of Personnel Administration  
Department of Managed Healthcare

**CC:** Secretaries  
Business, Transportation and Housing Agency  
Youth and Adult Correctional Agency  
State and Consumer Services Agency

### FROM: CALIFORNIA OFFICE OF HIPAA IMPLEMENTATION

<b>Title:</b>  Identification and HIPAA Preemption Analysis of State Law Relating to the Confidentiality and/or Privacy of Individually Identifiable Health Information	<b>Number:</b>  2002-02
<b>Subject:</b>  Preemption of State Law by HIPAA	<b>Issue Date:</b>  January 23, 2002
<b>Reference(s):</b>  January 14, 2002 Memorandum to Chief Counsels of All CHHSA Departments	<b>Expiration Date:</b>  N/A
<b>Contact:</b>  Stephen A. Stuart, Staff Counsel Health and Human Services Agency California Office of HIPAA Implementation 1600 Ninth Street, Room 460 Sacramento, CA 95814 (916) 651-6908 (916) 653-9588 FAX sstuart1@ohi.ca.gov	

As you know, State entities which have been identified as either covered or impacted by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) must be in compliance with those rules by April 14, 2003. As you may also know, the HIPAA privacy rules will, with some limited exceptions, preempt any less stringent State privacy rules with the result being that the privacy laws State entities will need to comply with will in fact be some combination of State and HIPAA privacy laws. The purpose of this memorandum is for the California Office of HIPAA Implementation (COHI) to request that your department, which has been identified as either a HIPAA covered or HIPAA impacted entity, assist COHI in identifying and analyzing for HIPAA preemption all State laws which relate to the confidentiality and/or privacy of individually identifiable health information. Please note that we have previously sent a separate and more extensive request to each of the departments within the Health and Human Services Agency.

The identification and analysis of these State laws is critical at this time because covered and impacted State agencies (including your departments) will need to know which privacy laws to follow in order to comply with HIPAA, and to assure that State laws are interpreted uniformly vis à vis HIPAA by all State agencies to which the laws apply. In addition, COHI will need to know, in a coordinated way, which State laws should be the subject of a request(s) for exception determination(s) to the Secretary of the federal Health and Human Services Agency well in advance of the HIPAA compliance date, and also to determine whether legislation is needed to conform any conflicting State law to HIPAA requirements.

Accordingly, we ask first that your department please identify all State laws<sup>1</sup> which relate to<sup>2</sup> the confidentiality and/or privacy of individually identifiable health information,<sup>3</sup> that your department is subject to, or is charged with enforcing. Second, with respect to each of the State laws identified, please answer the questions below which will assist COHI in determining which State laws may be preempted by HIPAA.

1. Does the State law provide for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention?
2. Does the State law require health plans (as this term is defined in HIPAA § 160.103) to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals?
3. Does the State law authorize or prohibit disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor?
4. Is the State law contrary to any HIPAA requirement(s) regarding individually identifiable health information, i.e., would your department find it impossible to comply with both the State law and the HIPAA requirement(s); or does the State law

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<sup>1</sup> (Constitutional provisions, statutes, regulations, rules, common law, or other State action having the force and effect of law)

<sup>2</sup> (I.e., the State law has the specific purpose of protecting the confidentiality or privacy of personal and/or health information or affects the confidentiality or privacy of personal and/or health information in a direct, clear, and substantial way)

<sup>3</sup> (Information which is: (1) created or received by the department; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual, and (i) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.)

stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA?

5. Does the State law prohibit or restrict a use or disclosure of individually identifiable health information in circumstances under which such use or disclosure would otherwise be permitted under HIPAA? If so, is the disclosure: (1) Required by the Federal Health and Human Services Agency in connection with determining whether a covered entity under HIPAA is compliant with HIPAA? Or (2) To the individual who is the subject of the individually identifiable health information?
6. Does the State law permit greater rights of access or amendment of individually identifiable health information by an individual who is the subject of the individually identifiable health information? In the alternative, does HIPAA permit greater rights of access than the state law?
7. Does the State law provide a greater amount of information than HIPAA to an individual who is the subject of the individually identifiable health information with respect to a use or disclosure, or the individual's rights or remedies?
8. Does the State law narrow the scope or duration of, increase the privacy protections afforded by, or reduce the coercive effect surrounding an authorization or consent for use or disclosure of individually identifiable health information as compared to HIPAA?
9. Does the State law require the retention or reporting of more detailed information regarding individually identifiable health information or provide for a longer duration than HIPAA?
10. Does the State law otherwise provide greater privacy protection for the individual who is the subject of the individually identifiable health information than HIPAA?
11. Is the State law necessary to prevent fraud and abuse related to health care provision or payment?
12. Is the State law necessary to ensure appropriate State regulation of insurance and health plans?
13. Is the State law necessary for State reporting on health care delivery or costs?
14. Is the State law necessary for serving a compelling need related to public health/safety/welfare and does the need to be served outweigh the interest in privacy?
15. Is the principal purpose of the State law the regulation of controlled substance manufacture, registration, distribution or dispensing?

**The State law identification and answers should be returned to COHI by March 1, 2002 at:**

Health and Human Services Agency  
California Office of HIPAA Implementation  
Attn: Stephen A. Stuart, Staff Counsel  
1600 Ninth Street, Room 460  
Sacramento, CA 95814

Thank you for your assistance in this matter.

BURT R. COHEN  
Director  
California Office of HIPAA Implementation